

IN THE SUPREME COURT OF MISSOURI

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No. SC84835

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R. MITCHEL BACHTEL and CARY M. BISBEY,

Appellants,

vs.

MILLER COUNTY NURSING HOME DISTRICT,

Respondent.

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ON APPEAL FROM THE CIRCUIT COURT OF MILLER COUNTY  
TWENTY-SIXTH JUDICIAL CIRCUIT

Hon. James A. Franklin, Jr.

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APPELLANTS' SUBSTITUTE REPLY BRIEF

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POINTS RELIED ON

- I. The Trial Court Erred in Dismissing Appellants' Petitions Because Appellants' Wrongful Discharge Claims Fall Within a Statutory Exception to Sovereign Immunity in that Respondent is Subject to the Anti-Retaliation Provisions of Chapter 198 R.S. Mo. and the Legislature Created a Waiver of Sovereign Immunity by Making Nursing Home Districts Subject to the Provisions of Chapter 198 and Not Making Any Distinction Between How Nursing Home Districts and Other Nursing Home Operators Are Treated Under the Statute and by Stating That the Act Shall Not Be Construed to Limit the Right to Seek Damages.**

H.S. v. Board of Regents, 967 S.W.2d 665 (Mo. App. E.D. 1998).

Clark v. Beverly Enterprises-Missouri, Inc., 872 S.W.2d 522 (Mo. App. W.D. 1994).

Matter of Maxey's Estate, 585 S.W.2d 326 (Mo. App. S.D. 1979).

Cummins v. Kansas City Pub. Serv. Co., 66 S.W.2d 920 (Mo. 1933).

§ 1.020(11) R.S. Mo. 2000).

§ 105.850 R.S. Mo. (2000)).

§ 198.067.5 R.S. Mo. (2000)).

§ 198.070 R.S. Mo. (2000)).

§ 198.093.6 R.S. Mo. (2000)).

## ARGUMENT

**I. The Trial Court Erred in Dismissing Appellants' Petitions Because Appellants' Wrongful Discharge Claims Fall Within a Statutory Exception to Sovereign Immunity in that Respondent is Subject to the Anti-Retaliation Provisions of Chapter 198 R.S. Mo. and the Legislature Created a Waiver of Sovereign Immunity by Making Nursing Home Districts Subject to the Provisions of Chapter 198 and Not Making Any Distinction Between How Nursing Home Districts and Other Nursing Home Operators Are Treated Under the Statute and by Stating That the Act Shall Not Be Construed to Limit the Right to Seek Damages.**

A. Express Mention of Sovereign Immunity Not Required to Find Waiver.

Respondent uses several rules of statutory construction to essentially argue that a waiver of sovereign immunity can never be found where a statute does not make express mention to sovereign immunity. Although it is true that some statutes contain provisions expressly waiving sovereign immunity, it does not follow that such express language is required for a waiver to exist. The Missouri Human Rights Act makes no express mention of sovereign immunity, yet it has been found to constitute a statutory waiver. Keeney v. Missouri Highway & Transp. Comm'n, 70 S.W.3d 597, 600 (Mo. App. S.D. 2002); H.S. v. Board of Regents, 967 S.W.2d 665, 673 (Mo. App. E.D. 1998) *see also* Hamby v. City of Liberty, 20 S.W.3d 515, 517 (Mo. banc 2000) (finding city employee's claim of wrongful discharge based on sex discrimination not subject to administrative review because judicial review procedures of Chapter 213 were available to her). Tax refund statutes have also

been held to contain a limited waiver of sovereign immunity despite making no express reference to the doctrine. Sprint Communications Co. v. Director of Revenue, 64 S.W.3d 832, 834 (Mo. banc 2002) (Section 144.190); Matteson v. Director of Revenue, 909 S.W.2d 356, 360 (Mo. banc 1995) (Section 143.801). What these statutes have in common with the Omnibus Nursing Home Act is that they make the state and/or its political subdivisions subject to their provisions and permit actions to recover damages. A waiver of sovereign immunity should be found under the Omnibus Nursing Home Act for the same reason a waiver has been found under the Human Rights and tax refund statutes.

Further proof that express waiver language is not required is demonstrated by the fact that some statutes contain language specifically preserving the protections of sovereign immunity. An example is the Worker's Compensation Act. While the Act applies to state employees, a statutory provision states that the extension shall not be construed as creating any liability in tort. § 105.850 R.S. Mo. (2000). If it were true that express language is required to create a waiver of sovereign immunity, there would be no need to pass a statute such as that.



B. Plain Meaning and Strict Construction Must Be Applied With View  
Towards Ascertaining the Intent of the Legislature. Omnibus Nursing  
Home Act Reflects Legislative Intent to Waive Sovereign Immunity for  
Violations of the Act.

Respondent relies heavily on the “plain meaning” rule to buttress its contention that a waiver of sovereign immunity cannot be found absent express waiver language. The Court of Appeals for the Southern District has defined the proper usage of the rule:

We bear in mind that the plain meaning rule, properly stated, is something more than a rule of literal construction. Statutory words and phrases should be construed according to everyday rules of grammar and common usage, but the purpose of the statute, considered historically and in context, must also be taken into account. Otherwise, the plain meaning rule states a mere tautology.

Matter of Maxey’s Estate, 585 S.W.2d 326, 328 (Mo. App. S.D. 1979). Thus, while Respondent would narrow the scope of this Court’s review to only those words that appear in the statutes at issue, it is clear that this Court can and should properly go beyond that to construe the statutes in a way that carries out the intent of the legislature.

In a similar vein, the strict construction rule that Respondent repeatedly emphasizes also has to be placed into a proper context. As this Court has stated:

We should remember that strict construction is not a precise, but a relative, expression; it varies in degree of strictness according to the

character of the law under construction. It is not the exact converse of liberal construction, for it does not consist in giving words the narrowest meaning of which they are susceptible. The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and the manifest purpose of the statute, considered historically, is properly given consideration.

Cummins v. Kansas City Pub. Serv. Co., 66 S.W.2d 920, 925 (Mo. 1933) (quotation marks and citations omitted). It has also been stated that strict construction does not mean adding to a statute burdens which were never contemplated by the legislature, and that “[t]he object and purpose intended by the lawmakers in the enactment of a statute is for the protection of law-abiding and honest citizens, and should be so construed and applied in every case, and never, if possible to otherwise construe it, should a statute be construed as to furnish protection to a thief or wrongdoer.” Peper v. American Exch. Nat. Bank, 205 S.W.2d 215, 221 (Mo. App. St. L. 1947). Strict construction thus does not automatically lead to a finding that no waiver of sovereign immunity exists.

It should also be borne in mind that a remedial statute, such as the Omnibus Nursing Home Act, is not to be strictly construed even though it changes a rule of the common law. O’Grady v. Brown, 654 S.W.2d 904, 908 (Mo. banc 1983). Instead, it is to be broadly construed, with all reasonable doubts construed in favor of applicability to the case.

Missouri Comm’n on Human Rights v. Red Dragon Rest., Inc., 991 S.W.2d 161, 166-67 (Mo. App. W.D. 1999). In a situation where two conflicting rules of statutory construction apply, those rules are subordinated to the requirement that the court ascertain and give effect to the intent of the legislature. Pierce v. State of Missouri Dept. of Soc. Svcs., 969 S.W.2d 814, 820 (Mo. App. W.D. 1998). The other rules of construction may be considered merely as aids in reaching that result, and the purpose and object of the legislation should not be lost sight of. State ex rel. School Dist. of Kansas City v. Young, 519 S.W.2d 328, 331 (Mo. App. K.C. 1975). The only subordinate aids which should be resorted to are those which subserve rather than subvert legislative intent. Tribune Pub. Co. v. Curators of the Univ. of Missouri, 661 S.W.2d 575, 583 (Mo. App. W.D. 1983). It is assumed that the intent of the legislature in enacting a statute is to serve the best interests and welfare of the citizenry at large. Id. Viewing the Omnibus Nursing Home Act in the context of the above cited rules leads to the conclusion that the legislature intended to create a limited waiver of sovereign immunity.

Respondent raises the question of whether it is a “person” as that term is used in Section 198.070. The Court of Appeals for the Western District has already found that the statute applies to corporate employers. Clark v. Beverly Enterprises-Missouri, Inc., 872 S.W.2d 522, 525 (Mo. App. W.D. 1994). A court’s construction of statutory language becomes a part of the statute as if it had been so amended by the legislature, and the statute must be read as if it incorporates the judicial interpretations placed upon it. State v. Crawford, 478 S.W.2d 314, 317 (Mo. 1972). Furthermore, Section 1.020 states that

unless otherwise specifically provided or repugnant to the intent of the legislature, the word “person” when appearing in a statute may extend and be applied to bodies politic and corporate. § 1.020(11) R.S. Mo. (2000). Thus, the word person as used in a tax exemption statute was found to include a corporation claiming the exemption, despite the rule of law that a tax exemption provision is to be strictly construed against the party who claims the exemption. David Ranken, Jr. Technical Inst. v. Boykins, 816 S.W.2d 189, 191-92 (Mo. App. E.D. 1991).

Respondent is a body corporate and political subdivision. (Resp. Sub. Brief, p. 7). And since the object of the Nursing Home Act is to regulate nursing homes to protect the health and safety of residents, it can scarcely be argued that applying the term “person” in § 198.070 to Nursing Home Districts would somehow be repugnant to the intent of the legislature. General rules of statutory construction and judicial interpretation both compel the conclusion that the term “person” as used in § 198.070 applies to Nursing Home Districts.

The New Liberty, Krasney and King cases relied on by Respondent for its express language argument are distinguishable. Krasney and King both deal with the anti-retaliation provision of the Worker’s Compensation Law. Krasney v. Curators of the Univ. of Missouri, 765 S.W.2d 646, 650 (Mo. App. W.D. 1989); King v. Probate Div., 958 S.W.2d 92, 93 (Mo. App. E.D. 1997). As noted earlier, a statutory provision extending the Worker’s Compensation Act to state employees specifically retains sovereign immunity for tort claims brought under the Act. § 105.850. The Omnibus Nursing Home Act

contains the opposite provision, stating that it shall not be construed to limit the right to seek damages. § 198.093.6 R.S. Mo. (2000). Those cases do not provide strong support for Respondent's argument that an entity can be subject to regulation under a statute, but immune to tort claims under it, since the statutes Respondent points to contain express language preserving sovereign immunity. The absence of such language was a factor used by the Court of Appeals for the Eastern District in finding a waiver of sovereign immunity under the Human Rights Act, and this Court should reach the same conclusion about the Omnibus Nursing Home Act. *See H.S. v. Board of Regents*, 967 S.W.2d at 673.

New Liberty involves an argument that "sue and be sued" language in the statute establishing hospital districts makes those districts liable in a traditional common law negligence action. *State ex rel. New Liberty Hosp. Dist. v. Pratt*, 687 S.W.2d 184, 186-87 (Mo. banc 1985). Appellants do not make such a broad argument here. The question before this Court is whether the legislature, by bringing Nursing Home Districts within the ambit of the Omnibus Nursing Home Act, and placing language in the statute protecting the ability to seek damages, created a limited waiver of sovereign immunity for suits brought over violations of the Act.

Finally, Respondent argues that the regulatory provisions of the Act provide sufficient protection to employees of Nursing Home Districts. As explained in Appellants' initial brief before this Court, the Act was spurred in part by the failure of state regulation to curb abuse of nursing home residents. (Apps. Sub. Brief, p. 14). The Act reflects the legislature's recognition of the inherent limits of state regulation by including provisions

stating that those regulations are not the exclusive remedy for violations of the Act, and ensuring that the right to bring suit for damages over violations of the Act shall not be limited. § 198.067.5 R.S. Mo. (2000); § 198.093.6. In passing those provisions, lawmakers recognized the reality that nursing home employees would not feel protected from retaliation unless they could initiate action on their own behalf, rather than rely on the discretion of a government official to act for them.

## CONCLUSION

WHEREFORE, for the reasons set forth above, Appellants ask that the judgment of the circuit court be reversed and that this case be remanded to the circuit court for further proceedings consistent with this Court's order.

Respectfully submitted,

**RINER & WALKER, P.C.**

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# CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies, pursuant to Rule 84.06, that this Brief complies with the limitations set forth in Rule 84.06(b) and contains 2,594 words as calculated pursuant to the requirements of Rule 84.06(b)(2); and that a copy of the Brief has been supplied to the Court in diskette form on a diskette that has been scanned and found to be virus free.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing brief were served by first class mail, postage prepaid, this 15th day of January, 2003 on Thomas E. Rice, Jr., 2400 Pershing Road, Suite 500, Kansas City, MO 64108, Attorney for Respondent.

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